great weight of authority,[8] which is represented by the recent case of *McCarthy* v. *First Nat. Bank of Rapid City*[9] (U. S. Sup. Ct. Feb. 19, 1912) not yet reported, in which the plaintiff's action for twice the amount of interest paid the defendant more than two years previous to the suit was held barred by the Statute of Limitations, though judgment for the principal had been recovered by the bank less than a year before, and the doctrine was laid down that the usurious transaction is complete when actual payment of interest at an usurious rate is made.

Doubtless the presumption of legality should free from the taint of usury any payments made with no understanding as to how they should be applied,[10] but to allow such an artificial presumption thus to change the character of payments regarded by the parties as interest and take the transaction out of the statute, is simply to assume the point in controversy by taking for granted that the payment itself does not in fact constitute the "usurious transaction" which is penalized.[11] Nor can any doctrine of equities directly affect the operation of a penal statute, the purpose of which was to punish and stamp out the charging and taking of interest above a specified rate. On the contrary, it is difficult to believe that Congress could have intended to put it in the power of the bank thus to make at its pleasure a new contract between the parties, and, at any time before satisfaction of the debt, to alter the established basis of their course of dealing; nor is it credible that the statute was designed to make the bank's penal liability depend, as it would if no action lay till full payment, upon the purely accidental circumstance of the debtor's financial ability. Still less can it be supposed that the act was based on any anology to the doctrine of *locus penitentiae* in criminal law. The argument that after payment of usurious interest such a time for repentance is given by the statute is simply based on the premise that these payments do not constitute the statutory offense, and is only another instance of assuming the question under discussion.

FRAUDULENT JOINDER AS GROUND FOR REMOVAL OF CAUSES.—The removal of an action to the Federal courts may not be demanded by a defendant not a resident of the State where the action is brought on the ground of diversity of citizenship, if a resident has been sued as co-defendant, unless the joinder be tainted with "fraud" on the part of the plaintiff; but it is not always clear what shall constitute the necessary fraud. It seems clear, on the one hand, in spite of a few intimations to the contrary, that if the plaintiff has in fact a good cause of action against both defendants his right to sue them jointly is absolute, even if his motive in so doing be to prevent a removal. His purpose is

---

[8]National Bank *v.* Carpenter (1889) 52 N. J. L. 165; First Nat. Bank *v.* Smith (1893) 36 Neb. 199; Brown *v.* Second Nat. Bank (1872) 72 Pa. 209; Pritchard *v.* Meekins (1887) 98 N. C. 244; Kinser *v.* Farmers' Nat. Bank (1882) 58 Ia. 728; Lynch *v.* Bank (1883) 22 W. Va. 554.

[9]Affirming the decision of the Supreme Court of South Dakota (1909) 23 S. D. 269, where the cases are fully discussed.

[10]See Hall *v.* First Nat. Bank (1890) 30 Neb. 99; Stout *v.* Ennis Nat. Bank (1887) 69 Tex. 384.

[11]See Lebanon Nat. Bank *v.* Karmany (1881) 98 Pa. 65.

immaterial.[1] On the other hand, it has been held that where a plaintiff, through an honest mistake as to a fact, erroneously joined with the non-resident a resident co-defendant against whom, as it proved, no action lay, a removal should be granted on the theory of fraud.[2] Again, where it appeared on the face of the complaint as a matter of law that the resident defendant was not liable, fraud on the plaintiff's part sufficient for a removal has sometimes been inferred on the basis of the artificial presumption that a man must know the law.[3] But the stigma of fraud should not be based upon a mere presumption, and a petition seeking removal on these grounds alone would seem by the better view to be insufficient as a pleading.[4] It amounts to no more than a traverse of the plaintiff's conclusions of law by a bare statement of contradictory conclusions, whereas the petitioner is bound to set forth and, if issue is taken, to prove facts in support of his charges of fraud.[5]

It is well settled that the State courts alone may entertain questions of pure law[6] such as the foregoing, but if the petition states that the facts upon which the plaintiff bases his right of action are untrue, and known by him to be so, and sets forth facts tending to support these allegations, a question of the respective jurisdiction of the State and Federal courts must be met. This situation was presented in the recent Oklahoma case of *Western Coal & Mining Co.* v. *Osborne* (1911) 119 Pac. 973, and the court though admitting that the complaint, if found to be true, stated a good joint cause of action, granted a removal in order that the issue of fact raised by the petition might be tried out in the Federal court. In the still later Kentucky case of *Cincinnati etc. Ry. Co.* v. *McElroy* (1912) 142 S. W. 1009, however, a removal was refused under similar circumstances on the ground that the plaintiff's evidence, being sufficient for the jury, involved a trial on the merits in the State court. The divergent lines of cases typified by the foregoing illustrate the unsatisfactory condition of the law applicable to the removal of causes.

Many of the decisions adhering to the latter of these two doctrines[7] rely on the supposed authority of *Alabama etc. Ry. Co.* v. *Thompson*;[8]

---

[1]Burlington & Quincy Ry. Co. *v.* Willard (1911) 220 U. S. 413; Thomas *v.* Great Northern Ry. Co. (1906) 147 Fed. 83.

[2]Diday *v.* N. Y. P. & O. R. R. Co. (1901) 107 Fed. 565; but see Whitcomb *v.* Smithson (1900) 175 U. S. 635.

[3]Warax *v.* Cincinnati etc. Ry. Co. (1896) 72 Fed. 637; Atlantic Coast Line Co. *v.* Bailey (1907) 151 Fed. 891; see Chesapeake & Ohio Ry. Co. *v.* Dixon (1900) 179 U. S. 131.

[4]Offner *v.* Chicago & E. R. R. Co. (1906) 148 Fed. 201.

[5]Unless the plaintiff refuses to join issue, in which case the allegation of fraud in the petition will be taken as true, Dishon *v.* Cincinnati etc. Ry. Co. (1904) 133 Fed. 471, and this though the petition be unverified. Donovan *v.* Wells, Fargo & Co. (1909) 169 Fed. 363.

[6]Though the Federal court has sometimes taken jurisdiction of the case to enquire into the sufficiency of the plaintiff's pleadings. Warax *v.* Cincinnati etc. Ry. *supra;* Atlantic Coast Line Ry. Co. *v.* Bailey *supra.*

[7]Shane *v.* Butte Electric Ry. Co. (1906) 150 Fed. 801; Thresher *v.* Western Union Tel. Co. (1906) 148 Fed. 649; Illinois Central Ry. Co. *v.* Sheegog (1909) 215 U. S. 308; Illinois Central Ry. Co. *v.* Houchins (1905) 121 Ky. 526; see Knuth *v.* Butte Electric Ry. Co. (1906) 148 Fed. 73.

[8](1906) 200 U. S. 206.

but in that case it was expressly stated that no question of fraud was involved, and accordingly it can lend them no support. Such a view, indeed, would seem to be an unreasonable restriction upon the Federal courts,[9] since it would result in preventing the determination of the ultimate issue of fraudulent joinder[10] simply because it entails an enquiry, to a certain extent, into the merits, and furthermore since it would apparently nullify every safeguard of the right of removal. There would be nothing to prevent a plaintiff from alleging in his complaint facts which, though he may know them to be false, would present a jury case, thus very simply obstructing a removal. On the other hand, if the petitioner by stating specific facts may take the question of fraud to trial in the Federal court, after its determination there, the case, whether retained or remanded, will ultimately be tried in the proper tribunal, and neither the State nor the Federal courts will stand in danger of being defrauded of their jurisdiction at the pleasure of unscrupulous litigants.

LIS PENDENS AS APPLIED TO PERSONAL PROPERTY.—The sole purpose of the doctrine of *lis pendens* is to prevent frustration of the decree of the court by alienation of the property in litigation,[1] and this purpose is accomplished by enforcing the decree against all persons who have acquired an interest *pendente lite* in the same manner as though they had been parties to the suit.[2] In England the position has been squarely taken that this rule does not apply to personal property,[3] but in America the contrary view has generally prevailed.[4] The only theory upon which it has ever been sought to justify this discrimination is that in suits involving chattels, judgment is in the alternative for the return of the chattel or the payment of its value, at the defendant's option, so that the judgment cannot be defeated by an alienation of the subject-matter.[5] It is evident, however, that this theory is limited to legal actions, in which alone the judgment is of that character, and in such actions the doctrine of *lis pendens* is of comparatively small importance.[6] Obviously it can never affect the substantive rights of the parties, for ultimately the

[9]Shepherd *v.* Bradstreet (1895) 142 Fed. 142; see McGuire *v.* Great Northern Ry. Co. (1907) 153 Fed. 434; Prince *v.* Illinois Central Ry. Co. (1899) 98 Fed. 1; St. Louis etc. Ry. Co. *v.* Adams (1908) 87 Ark. 136.

[10]Gustafson *v.* Chicago etc. Ry. Co. (1904) 128 Fed. 85.

[1]See Bellamy *v.* Sabine (1857) 1 De G. & J. *566; 7 COLUMBIA LAW REVIEW 282.

[2]See Norris *v.* Ile (1894) 152 Ill. 190, 199.

[3]Wigram *v.* Buckley (1894) L. R. 3 Ch. 483; 38 Sol. Journ. 677; 16 Harv. L. Rev. 225.

[4]Reid *v.* Sheffy (1897) 75 Ill. App. 136; *contra,* Calkins *v.* First Nat. Bank (1906) 20 S. D. 466. The view that articles of ordinary commerce do not fall within the doctrine of *lis pendens,* a rule well established in the case of negotiable paper, seems to have originated in the dictum of Chancellor Kent in Murray *v.* Lylburn (N. Y. 1817) 2 Johns. Ch. 441, 444. While his statement has been frequently quoted with approval, it is believed that in no case have such articles actually been excluded upon that ground. The difficulty of drawing a line is obvious.

[5]Wigram *v.* Buckley *supra;* Calkins *v.* First Nat. Bank *supra.*

[6]2 Pomeroy, Eq. Jur., (3rd ed.) §§ 633, 636; see Burnham *v.* Smith (1899) 82 Mo. App. 35, 46; Sheridan *v.* Andrews (1872) 49 N. Y. 478, 482.